

2003 WL 25746168 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Mississippi.
Grenada County

The Estate of Vader I. PERRY by and Through Betty Rayburn, Administratrix of the Estate of Vader I. Perry, for the Use and Benefit of the Estate of Vader I. Perry, and for the Use and Benefit of the Wrongful Death Beneficiaries of Vader I. Perry, Plaintiff,

v.

MARINER HEALTH CARE, INC.; F/K/A Mariner Post-Acute Network, Inc.; Grancare, Inc.; Evergreen Healthcare, Inc.; National Heritage Realty, Inc.; John Does 1-10; and Unidentified Entities 1-10 (as to Grenada Health & Rehabilitation Center), Defendants.

No. 2001-0485CVL.
December 5, 2003.

Defendants' General Motions in Limine

[Richard E. Circeo, J.D.](#), Wilkes & McHugh, P.O. Box 1768, Hattiesburg, MS 39403-1768, (601) 545-7364.

[Senith Tipton, J.D.](#), Wilkins, Stephens & Tipton, P.A., P.O. Box 13429, Jackson, MS 39236-3429, (601) 981-7608.

NOW COME National Heritage Realty, Inc. ("National Heritage"), Evergreen Health Care, Inc. ("Evergreen"), GranCare, Inc. ("GranCare"), and Mariner Health Care, Inc. ("Mariner"), herein collectively referred to as "Defendants," by and through counsel, and respectfully move this Court to enter an Order adjudicating and directing that the Plaintiffs, their counsel and any witnesses being called by the Plaintiffs or Defendants shall not, either in opening statements, voir dire, or oral testimony, nor through any questions put to any of the Plaintiffs' witnesses or adversarial witnesses, nor otherwise in the presence of the jury in any manner, disclose information regarding or referencing the existence of any of these matters:

1. INSURANCE

Any information regarding any insurance coverage of the Defendants with any company as prohibited by Rule 411 of the Mississippi RULES OF EVIDENCE, either generally, or specifically, and farther direct that all references to insurance coverage, insurance adjusting, or any other direct or indirect reference to Defendants' insurance company contained in any documents, writings, photographs or records sought to be introduced as an exhibit be excluded and/or redacted from the exhibit and no reference directly, or indirectly, made thereto.

2. LAY OPINIONS

Any evidence regarding any lay opinions concerning the cause of Vader Perry' alleged injuries and damages, the cause and/or manner of his injuries and/or damages or any other matter to be properly addressed by an expert including, but not limited to, testimony by a certified nurse assistant or any other nurses' aide regarding the care and treatment of Vader Perry, any testimony regarding the appropriateness of the care provided to Vader Perry, or any personal opinions regarding care or treatment to Vader Perry, or any other residents at Grenada Health & Rehabilitation Center, or any conditions at Grenada Health & Rehabilitation Center on the grounds that such opinions are beyond the common knowledge of a lay person and should be introduced solely through qualified experts, invade the province of the jury, would be in violation of Mississippi RULES OF EVIDENCE 403. 701 and/or 703 and/or said testimony would be in violation of the following ruling by the Mississippi

Supreme Court. *Roberts v. Grafe Auto Co., Inc.*, 701 So.2d 1093, 1099 (Miss. 1997) (holding that a police officer could not give lay opinions as to the cause of an accident); *Parmes v. Illinois Central Gulf RR*, 440 So.2d 261, 267 (Miss. 1983) (holding that the opinion of a lay witness is not allowed to establish the dangerousness of an overpass), and/or *Wyeth Laboratories, Inc. v. Fortenberry*, 530 So.2d 688, 692 (Miss. 1988) (expert testimony necessary to assist the trier of fact to understand the evidence or determine the facts and the issue when the issue presented requires the scientific, technical, or other specialized knowledge).

3. ANY AND ALL EVIDENCE AND/OR TESTIMONY BY ANY EMPLOYEES OF GRENADA HEALTH & REHABILITATION CENTER WHO WERE INTERVIEWED AND/OR SPOKE WITH PLAINTIFF'S INVESTIGATOR

Defendants anticipate that plaintiff will seek to introduce evidence at trial from employees, including former employees, who were interviewed and/or spoke with plaintiff's investigator(s), plaintiff's counsel or other employees of plaintiff's counsel. Specifically, such contact is in violation of MISSISS?? RULES OF PROFESSIONAL CONDUCT Rule 4.2 provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comments to this rule states:

In the case of an organization, this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purpose of this rule.

The comments to Rule 5.3 further provide that:

Lawyers generally employ assistance in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional service.

The defendants' request that the Court *voir dire* each employee witness proffered by the plaintiff to determine which have spoken with plaintiff's attorneys, and to ban plaintiff from proffering the testimony of these witnesses.

4. INCIDENTS INVOLVING OTHER RESIDENTS

Defendants anticipate that plaintiff may attempt to introduce evidence of other incidents involving other residents by way of former employee testimony, testimony of the plaintiff, surveys, reports, and other means. None of this alleged evidence regarding other residents has anything to do with this resident, Vader Perry, and the evidence is both irrelevant and prejudicial. Additionally, introducing evidence of other residents is in violation Mississippi statutory and case law,

Miss. CODE ANN §13-1-21 sets for the privilege as follows:

“All communications made to a physician, dentist, hospital, nurse, pharmacist, podiatrist, optometrist, or chiropractor, by a patient under his charge or by one seeking professional advice are hereby declared to be privileged, and such parties shall not be required to disclose the same in any legal proceeding, except at the

instances of the patients, or in case of death of the patient at that instance of his personal representative or legal heirs in case there be no personal representative or except if the validity of the will of the decedent is in question. At the instance of the personal representative or any of the legal heirs or any contestant or proponent of the will.”

This privilege is deserving of the highest respect and is not to be obviated absent a showing that the health and life of another are at stake if the privilege is not waived, or if the person to whom the privilege applies is one of only a handful of potential witnesses to an action. *Baptist Memorial Hospital-Union County v. Johnson*, 754 So.2d 1156, 1168 (Miss. 2000). In *Johnson*, the Court held that the identity of a patient who had mistakenly breast fed the plaintiffs child who was suffering from medical condition was subject to disclosure due to the compelling and competing interest of the health and well being of another person. Such is not the situation in this case; therefore, any information in any form which identifies by name or condition another resident at the facility should be excluded.

5. TESTIMONY OF FORMER EMPLOYEES REGARDING GENERAL CONDITIONS AT GRENADA HEALTH & REHABILITATION CENTER THAT ARE UNRELATED TO Vader Perry

Any testimony, evidence, references to, or comments regarding general nursing home conditions, general criticisms of the nursing home, and allegations of inadequate healthcare, staffing, or treatment of residents other than Vader Perry, or other incidents unrelated to Vader Perry, included in testimony of employees and/or former employees of evidence regarding issues other than the care and treatment of Vader Perry. This information is not relevant, and any remote, probative value is outweighed by unfair prejudice. The purported evidence would not provide or disprove any material fact or allegation related to the allegations that are the basis of this cause of action, and would be in violation of MISSISSIPP RULES OF EVIDENCE 401, 402, and/or 407. It would further serve to mislead the jury, confuse the issues, and/or would be unduly prejudicial to the Defendants. Further, such information is not applicable to any of the injuries or damages alleged by the plaintiff and did not, in any way, regard any treatment provided to Vader Perry.

6. SCOPE OF TESTIMONY BY NURSES

Defendants anticipate that plaintiffs will attempt to elicit testimony from her listed nurse expert regarding medical issues which are properly within the knowledge of a physician, including any causal relationship between alleged substandard care and the injuries to Vader Perry and/or the plaintiffs. No nurse witness, whether identified by the plaintiffs as an expert, or not, should be permitted by this court to provide any medical opinion. If the plaintiffs seek to introduce medical opinion testimony at trial, the plaintiffs must do so only through a witness duly qualified as a medical expert. A nurse does not have sufficient training, knowledge, or education to qualify as an expert that is competent to render opinions on medical conditions. MISSISSIPPI RULES OF EVIDENCE 403, 701 and/or 703.

Moreover, it is anticipated that the plaintiffs will attempt to elicit testimony from said nurses and nurse expert regarding violations of the Rules, Regulations and Minimal Standards for Institutions for the Aged or Infirm in the State of Mississippi and/or survey violations. None of the plaintiffs experts have experience as a surveyor and, therefore, do not have sufficient training, knowledge, or education to qualify as an expert that is competent to render opinions on survey issues. MISSISSIPPI RULES OF EVIDENCE 403, 701 and/or 703.

7. CRITICISMS OF DEFENDANTS BY FORMER EMPLOYEES OF GRENADA HEALTH & REHABILITATION CENTER WHO DID NOT TREAT OR CARE FOR VADER PERRY

Any testimony by former employees that did not treat or care for Vader Perry, regarding criticisms of the Defendants, including Grenada Health & Rehabilitation Center, that does not directly implicate the care and treatment provided to Vader Perry in violation of M?? RULES OF EVIDENCE 401, 402 and/or 407.

8. SUBSEQUENT REMEDIAL MEASURES

Any and all testimony or other evidence from the plaintiff regarding any corrections, amendments, changes in any procedures or survey plans of correction must be excluded on the grounds that said testimony or other evidence is a subsequent remedial measure, which is prohibited pursuant to [MISSISSIPPI RULES OF EVIDENCE 407](#) and/or said evidence would be in violation of the following ruling by the Mississippi Supreme Court: *Sawyer v. Illinois Central Gulf RR Co.*, 606 So.2d 1069 (Miss. 1992) (evidence of subsequent remedial measure, such as installation of flashing lights at a railroad crossing after an accident occurred, cannot be introduced at trial).

9. UNDERSTAFFING OR IMPROPER STAFFING

Any and all testimony or evidence regarding any understaffing or improper staffing must be prohibited. as there is no admissible evidence that Grenada Health & Rehabilitation Center was understaffed or otherwise improperly staffed at the time of any alleged acts of negligence in this matter. Additionally, any alleged evidence of understaffing is irrelevant to the issue of this case. Simply put, either negligence or medical malpractice occurred, and whether or not the facility was understaffed is not relevant. Any such testimony or docum??ts regarding the same would be in violation of the M?? RULES OF EVIDENCE 401 and/or 403 as said evidence is speculative, irrelevant, unduly prejudicial, would serve to confuse the issue and/or would be misleading to the jury by allowing the plaintiff to second guess the actions of a facility in absence of any statutory or other violation by Grenada Health & Rehabilitation Center.

10. 24-HOUR CARE

Any and all evidence regarding the absence of any employee in Vader Perry' room, lack of 24-hour supervision or any reference thereto as there is no national, state, or local rule, statute or regulation regarding the same and evidence of such would be in violation of M?? RULES OF EVIDENCE 401 and/or 403 as said evidence is irrelevant, unduly prejudicial, would serve to confuse the issue and/or would be misleading to the jury.

11. PHOTOGRAPHS

Any and all references, testimony, or attempts by the plaintiffs, their attorneys, witnesses, or plaintiffs experts to introduce o r testify regarding any photographs, including p hotographs o f pressure ulcers, or any photographs of Vader Perry that have not been previously disclosed in ??

Richard E. Circeo, J.D.

Wilkes & McHugh

P.O. Box 1768

Hattiesburg, MS 39403-1768

(601) 545-7364

Senith Tipton, J.D.

Wilkins, Stephens & Tipton, P.A.

P.O. Box 13429

Jackson, MS 39236-3429

(601) 981-7608

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.